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THE DOCTRINE OF CONTINUOUS VOYAGES IN THE EIGHTEENTH CENTURY

I

It would not be possible to understand, much less to state clearly, the origin, nature, and extent of the so-called Doctrine of Continuous Voyages without explaining, even in a succinct manner, the causes that contributed to the statement of this famous principle. There is hardly anything in the field of social conceptions that is not in some way or other connected with the past. For this reason when we want to ascertain the principles that obtained in a period gone by it is imperatively necessary that our inquiries should start from an age even more remote, so that the light of history may clear the paths that we intend to explore. During the middle of the eighteenth century nothing was heard of the doctrine which we attempt now to expound; it was only at the end of that century that its first manifestations appeared. But the examination of the navigation laws of the times and of the principles of international law that regulated the intercourse between neutrals and belligerents would at once suggest that the prohibition which the doctrine embraced is dependent on or complementary to the so-called "Rule of war of 1756."

Long before the eighteenth century the colonizing Powers of Europe had restricted the trade of their colonies to vessels of their own country. They did not allow supplies to be carried to them in foreign ships,¹ and they prohibited in the same manner the exportation of colonial produce except by means of national vessels. The European Powers upheld strenuously this system of "the closed door," for they thought that on its adherence depended entirely, or mainly at least, the value of their colonial possessions. In fact freedom of navigation during the eighteenth century did not exist. At the outbreak of the war between England and

¹ England had provided for the monopolization of her colonial trade by the Navigation Act of 1651.

France in 1756, the latter Power, finding herself disabled, on account of her relative weakness upon the sea, from carrying on her colonial trade, decided to relax her monopoly in favor of the Dutch, who were then neutral. Dutch merchantmen were permitted, under certain restrictions, to carry on the trade between France and her dependencies, but other neutral traders continued to be excluded. The English prize courts thereupon condemned all Dutch vessels engaged in this traffic, together with their cargoes, on the ground that such vessels had incorporated themselves in the merchant service of the enemy by carrying the trade which, prior to the war, was monopolized by French ships. In fact "they were considered as made French by adoption." This limitation of the neutral commerce has generally come to be known as "The Rule of War of 1756," because the cases that demanded its application occurred then for the first time.

The reasons on which the rule is founded were brilliantly given by Sir William Scott when it was his duty to deliver his judgment in *The Immanuel*. He expressed himself as follows:

The general rule is, that the neutral has a right to carry on, in time of war, his accustomed trade to the utmost extent to which that accustomed trade is capable. Very different is the case of a trade which the neutral has never possessed, which he holds by no title of use and habit in times of peace, and which, in fact, can obtain in war by no other title, than by the success of the one belligerent against the other, and at the expense of that very belligerent under whose success he sets up his title; and such I take to be the colonial trade, generally speaking * * * It cannot be contended to be a right of neutrals, to intrude into a commerce which had been uniformly shut against them, and which is now forced open merely by the pressure of war; for when the enemy, under an entire inability to supply his colonies and to export their products, affects to open them to neutrals, it is not his will but his necessity that changes his system; that change is the direct and unavoidable consequence of the compulsion of war.²

The principle embodied in this rule was considered to be a part of the law of nations, and as such it was enforced by the English prize courts during the latter part of the eighteenth century. This statement would seem to be somewhat vague, but it must be borne in mind that it is hardly possible to venture a more definite assertion in this connec-

² 2 C. Rob. 186.

tion without entering into a detailed examination of the usages then prevailing with regard to the rules of war on sea. It is of course quite likely, as has been observed by an able authority,³ that after an inquiry into the maritime customs of a given age, the international rules founded in them may, in general, be considered to be unsatisfactory, for the laws of war on sea embodied the conduct of an earlier period and such conduct might not be in harmony with the actual times, and also because they may find their source in the *ex parte* ordinances of a given government.

It is needless to say that the application of the rule was bound to produce some kind of hardships on neutral traders who would lose an opportunity for the opening offered during war time. The interests of neutrals and belligerents are necessarily divergent in such cases, and hence it was natural that the conduct of England should give rise to a considerable number of disputes. Nothing, however, was settled by any convention respecting the lawfulness of neutral commerce with the colonies of a belligerent state. The rule laid down in 1756 received new impetus at the outbreak of the war of 1793, for England then issued stringent regulations in connection with the carriage of the colonial trade of her enemy. A loud protest was immediately heard from those neutral states whose merchants had been engaged in the colonial traffic. Possibly owing to this, the English government issued milder instructions in January, 1794. They were to the effect that "such vessels as were laden with goods the produce of the French West India Islands, and coming directly from any part of the said islands to Europe" were to be seized. Nothing was said in the royal order respecting the voyage of a neutral vessel from Europe to the French colonies or of the traffic between the West Indian islands and the United States. These instructions, therefore, constituted a relaxation of the rule of war, but it is clear that the effect of this municipal regulation could not be held to preclude this country from asserting, to its full extent, the principle contained in the rule in some subsequent period. For it is to be kept in mind that the prohibition of carrying on the trade of the colony by a neutral state was considered to be a principle of the law of nations, and hence this could not possibly be affected by the municipal regula-

³ Sir John Macdonell.

tions of any one Power. International law cannot be altered by the *ipse dixit* of one of the members of the family of nations.

A further relaxation of the rule with which we are now dealing was introduced by the royal order of January, 1798.

It directed the bringing in for adjudication of "vessels laden with the produce of any island or settlement of France, Spain or Holland, and coming directly from any port of the said island or settlement to any port in Europe, not being a port of this Kingdom or of the country to which the vessel, being neutral, should belong." That is to say, neutrals were allowed to bring the produce of the hostile colonies directly to ports of their own country, or to England.

It should here be observed that the validity of the Rule of War of 1756 was seriously threatened by the combination of the continental Powers who subscribed to the so-called Armed Neutralities of 1780 and 1800; but the legitimacy of the practice was nevertheless upheld by the English courts. Finally, the lack of success on the part of the continental states to guarantee the enforcement of the provisions issued may fairly be taken as the triumph of the British contentions.

II

When neutral traders saw themselves enabled to traffic, free from the interference of the English courts by virtue of the royal orders which we have noted, from the hostile colonies directly to their own ports or to England, in the event of a war to which this Power was a party, they attempted to find a way for obtaining absolute freedom of trade with the colony, and thus defeat the royal orders that granted them the indulgence by relaxing the rigor of the rule of 1756. Their purpose was to carry trade also between the colony and the mother country, because in this latter place better prices could be secured. They found an indirect means opened to them for the attainment of their ultimate end. Thus they might proceed to some port of their country and then re-export the goods in the same or different vessels to a belligerent port. The traders of the United States were in a peculiarly favorable position for adopting this line of action, when it was intended to carry the trade of the French, Spanish, or Dutch colonies to their respective mother

countries during the war between England, on the one hand, and France, Spain, and Holland on the other, so far as the trade related to the colonies in the New World.⁴

It is evident that England, in receding from the strict application of her belligerent rights in connection with the carriage of the colonial trade, did not intend to allow the colonial produce to find its way into the hands of her enemy. If such cargoes were permitted to be re-exported from the neutral ports to the hostile country, then her enemies would hardly experience any serious effect from the war with regard to their colonial trade. If England's intentions had not been to diminish in this way the resources of the enemy, as she was entitled to do by the law of nations, it would have been a better plan to allow neutrals to conduct the colonial trade in the most open manner in a direct and single voyage; for if this had been the case, "both the terms of the voyage being hostile, and the papers put on board at the port of shipment, being derived from an enemy, or from agents in the hostile country, the suspicion of a visiting officer would naturally be wide awake; and a strict examination, even though the vessel should be brought into port for the purpose, would, generally speaking, be justifiable and safe. The alleged right of property in a claimant of the cargo, might also in such a case be examined up to its acquisition in the hostile country, by the light of the evidence found on board." ⁵

In fact, no other was the intention of the British Government, as may be conceived by the attempt to incorporate the principle contained in the royal instructions in the form of a conventional agreement in the Jay Treaty entered into between England and the United States. It was stipulated in the project of the treaty that the products of the West Indies that had been imported into the United States should not be re-exported from the country during the period of hostilities. But at the ratification of the treaty by the United States this article was excluded.

It is, therefore, evident from what has been said that the spirit of the royal orders was to the effect that there should be a *bona fide* importation of the colonial produce into the neutral country that was to benefit by the relaxation of the principle, that is to say, that the voyage of the

⁴ Wharton, International Law of the United States, 3388.

⁵ Stephen, War in Disguise, 3rd edition, p. 51.

vessel engaged in such a trade should actually and not "colorably" originate or terminate in the neutral port or in England.

In order duly to enforce the royal instructions and thus defeat the fraudulent plan adopted by the neutral traders, it would have been necessary to institute a very severe inquiry, not because of any difficulty in the interpretation of the royal orders, since their meaning was quite clear, but simply on account of the heavy burden imposed on the captors to prove the *mala fides* of the traders. This would naturally embrace an inquiry into their state of mind—a process which has never been an easy one, for "the devil himself," according to a mediæval judge, "knoweth not the heart of man." Only by means of external acts would it have been possible to raise the presumption of the illegality of the voyage and thus make the vessel and her cargo liable to confiscation. It is of importance to remember that a captor at sea could hardly have the opportunity or the means of ascertaining the real truth about a dubious case. There cannot be any hard and fast rules for disclosing from external facts the intention of a certain person. Accordingly it is not difficult to believe that the fraudulent practice went on undetected for some time before it came to the cognizance of the courts; for the visiting officer would in most cases be satisfied with the presentation by the captain of the vessel of a certificate purporting what was true, namely, that the vessel was sailing from a neutral port. In this way the first part of the voyage remained ignored. It is possible, however, that the practice may have been incidentally noticed by the courts of law in the course of their procedure, but, so far as we know, no steps were taken to check the abuse until, by the happening of an accident, a vessel and her cargo were brought in for adjudication by the courts.

Towards the end of the century, while the war was still raging, a British vessel overhauled and examined an American ship carrying a cargo of sugar from Havana to Charleston. As it appeared that both ship and cargo belonged to neutral owners and that the vessel was bound for a neutral port, where the voyage was to end, she was immediately released. As a matter of fact, this vessel was engaged in the forbidden trade, according to the spirit, though not the letter, of the royal orders. She proceeded to Charleston and after a few days left that port with the same cargo for a European market. She took a new set of papers both

from the owners and the custom house authorities, purporting that the cargo had been taken on board at Charleston. During this later voyage the ship was again visited by a British cruiser, which found her papers to be entirely correct. She was nevertheless seized, for the simple reason that the visiting officer was no other than the person who examined her during the earlier part of the voyage to Charleston. He was able to identify both ship and cargo as the very same ones which he had lately examined and released. The Lords Commissioners of Appeal for Prize Causes found the facts clear and convincing, and hence condemned the property. It was held in the case that "the touching at a neutral port, merely for the purpose of colorably commencing a new voyage, and thereby eluding the respective rule of law, in a branch of it not relaxed by the royal instructions, could not legalize the transaction; but that it ought nevertheless to be considered as a direct and continuous voyage from the hostile colony to Europe, and consequently illegal."⁶

The proof in this case had been conclusive and there was absolutely no evidence on the part of the owners to contest the seizure, but no doubt cases arose in which the question would not be so clear, and then the decision, after an unsuccessful attempt to discover the intention of the traders, would be in their favor. Let us for the sake of clearness examine another case of this kind. We might also perceive the minute provisions and extraordinary care that may be taken by the traders in order to carry on their illegal plan and avoid condemnation as far as possible.

In June, 1799, an American ship took a cargo of sugar from Havana, a Spanish colony, to Marblehead, in America. There she took some cocoa, the produce of the Spanish settlement of La Guaira, which was transhipped from a schooner lying at Marblehead, under an original destination to Europe. A quantity of fish was included in her cargo, and then she sailed for Spain in August of the same year. She was seized and brought in for adjudication. The ship had been restored, and in respect of the cargo the question was heard as a case of further proof. Sir William Scott in his judgment came readily to the conclusion that the property, so far as it related to the fish, was not liable as it was

⁶ Case of *The Mercury*, cited by Stephen, *op. cit.*, p. 53; Acton, Reports of Cases, Vol. 1, p. 51.

an American produce. With regard to the rest of the cargo the question of law that had been raised was whether a neutral who is not allowed to carry on the trade between the colony and the mother country would be permitted to do it circuitously. The learned judge pointed out that "an American has undoubtedly the right to import the produce of the Spanish colonies for his own use; and after it is imported *bona fide* into his own country, he would be at liberty to carry it on to the general commerce of Europe," the obvious inference being that if the importation is not *bona fide* and the cargo is subsequently exported to Europe, the property becomes liable on the ground that the transaction is illegal *ab initio*. But he ordered the restitution of the cargo on the ground that the goods in question had been landed and that the duties for them were paid in America, regarding these facts as general indications as to the test of *bona fide* importation into the neutral country, although he pointed out that it was not his business to say what was the universal test in such matters.⁷

Even so minute an inquiry into the propriety of the voyage was not enough in order to enforce the rule which the judges of the Court of Admiralty thought to be binding. They perceived the possibility of the adoption on the part of the traders of the fraudulent plan which we have described, which would do away with the prohibition of the royal instructions. But the very fact that the proof necessary for showing the voyage to be a continuous one was connected with the difficult question of intention, may be taken as an explanation for the continuance of this practice undetected, in spite of the decisions of the courts that the trade between the colony and the mother country in time of war, even in a circuitous manner, was illegal. For the traders had necessarily a loophole in the interpretation of the notion of intention. They could, and in fact did, take such measures as to be able, in certain cases, to "prove" that they had no *mala fides* when they first brought the colonial produce into their country.

Traders are said to have gone to the expense of landing their cargoes in America and then reshipping them in the same transport when it was intended to carry on the colonial trade to the mother country. This comparatively insignificant provision was naturally considered a cheap

⁷ Case of *The Polly*, 2 C. Rob. 361.

precaution in case the vessel should be seized, as it would furnish some evidence of the intention to incorporate the goods in the general stock of the neutral market.

The payment of duties in the neutral port when the goods arrived there *in transitu* may appear *prima facie* a very expensive process, even if this fact alone would be considered as rendering the property free from condemnation. The state of a belligerent market may be very attractive, but if the trader had to undergo not only a certain amount of risk, but also the heavy expenses of a real importation into a neutral country for immediate re-exportation, it is possible, indeed probable, that he might be tempted to direct his energies to a more profitable channel. But fortunately for the American trader, this difficulty could be obviated, for he was allowed to pay the importation duties in a "colorable" manner. According to an Act of the United States of March, 1799, on the arrival of a cargo destined for exportation the trader was permitted to land the goods without being compelled to pay the duties; the only thing which he had to do was to give a bond whereby he agreed to pay the corresponding duties in the event of the goods not being re-exported. On their re-exportation the custom house authorities effected the usual clearances just as in the case of originally exported goods, and no mention was made of the bond that had been given. Such provision could not but help the trader to furnish himself with a very valuable *item* for the "proof" of his *bona fides* in case his cargo should be seized. It was evident that there could not be any difficulty in certifying that "the duties had been paid *according to law*." We need not wonder that at the time the United States were accused of framing this Act with the principal, if not the only object, of shielding American vessels that were engaged in this illegal trade.

The trader had a much easier task when he came to consider the question of the insurance on the cargo. At first it seems to have been the practice to effect an insurance of the entire intended voyage, with the option of touching in an American port; but finally they came to adopt the much safer plan of insuring the two parts of the voyage as two different transactions—in the first part the neutral port appeared to be the final destination, and in the other it was the original starting place of the vessel. It would seem hardly relevant for our purpose to continue

the detailed account of the minute precautions adopted by the traders in order to show what they did not have, namely, an intention to incorporate the goods in the general stock of the country. Suffice it to say that in time the English courts came to consider the circumstances of the cargo and the payment of the duties as insufficient evidence of a *bona fide* importation into a neutral port.⁸

It was not until the beginning of the nineteenth century that Sir William Scott and Sir W. Grant dealt with the practice, condemning it in the most unequivocal language, the former in *The Maria*,⁹ and the latter in *The William*;¹⁰ and thus the theory was firmly established that in such cases the two voyages were in reality parts of one and the same transaction in which a forbidden cargo was taken to a forbidden destination.

III

The mere recital of the facts that brought the theory into existence would seem in itself a sufficient justification for its application in connection with the carriage of colonial trade to the mother country. It may perhaps be objected that the rule was a hindrance to neutral commerce and that consequently great hardships were placed upon traders; but the state of international law at the time with which we are dealing was such that it cannot be said that injustice was in any way inflicted on them by the belligerent who caused the enforcement of the doctrine, and therefore, as long as those circumstances continued, any condemnations under it cannot but be pronounced to have been perfectly legal. But whatever may be the opinion with regard to the application of the theory to colonial trade, it cannot be doubted that the principle embodied in the doctrine is sound in itself. It is hardly necessary to point out that the circumstances which called for the enunciation of the famous doctrine are not likely to arise again, for nearly all the members of the international family have long abandoned the practice of monopolizing their colonial trade, and, according to the Declaration of Paris of 1856,

⁸ See the case of *The Enoch* and *The Rowena*, July 23, 1805, cited by Sir William Scott in *The Maria*, Roscoe, Reports of Prize Cases, Vol. 1, p. 497.

⁹ Roscoe, *op. cit.*, p. 497.

¹⁰ Roscoe, *op. cit.*, p. 505.

neutral vessels have the right to carry enemy property with the exception of contraband of war.

As it has not been our intention in this connection to enter into a speculation of the application of the doctrine during the nineteenth century, nothing will be said of the working of the theory with regard to contraband of war or of its later extension to blockade. Our purpose has been merely to lay down the principle underlying the doctrine and to make an attempt to recall the occasion that brought it into life. We have thus unavoidably perceived that it is impossible to deal with this part of the history of international law in the eighteenth century without entering into the economic state of affairs then prevailing. The interpretation of the laws of war on sea was, as we have already observed, based mainly on the usages of earlier times, which found their source in the municipal regulations of the maritime nations; and these *ex parte* ordinances were in their time primarily devoted to the solution of problems of an economic character. Hence it is that in a state of war neutral commerce was profoundly affected, and as a natural consequence of this fact there was a fierce struggle—purely economic—between the belligerents on the one hand and the neutrals on the other. In the history of the Doctrine of Continuous Voyages in the eighteenth century we are able to notice ample illustration of this neutro-belligerent conflict, as well as the plausible ingenuity adopted by the neutrals during the struggle and the subtle measures resorted to by the belligerent in order to counteract the tendencies of their enemies. The prevailing idea in this conflict was that the neutral should give way.

HARMODIO ARIAS.